Supreme Court, U.S.
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No. _____

in the

Supreme Court

of the

United States

SAMUEL WHITT,

Petitioner,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

Does the Petitioner's life sentence, based upon judicial findings regarding the amount of drugs involved in the offense and prior convictions, violate *United States v. Booker*?

II.

Did counsel render ineffective assistance when he failed to present a fingerprint expert, given that one fingerprint was the sole physical evidence tying the Petitioner to the offense?

III.

Did counsel labor under an actual conflict of interest which prevented him from adequately representing the Petitioner?

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SAMUEL WHITT

Petitioner,

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UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Samuel Whitt, respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on September 3, 2003. A Petition for Rehearing En Banc was denied on January 21, 2005.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is unreported (Case Nos. 03-1974 & 03-2367) That determination is attached hereto in Appendix 1. The denial of a Petition for Rehearing En Banc is attached as Appendix 2. The Petitioner's 28 U.S.C. § 2255 motion was initially denied by the United States District Court for the Northern District of Indiana in an unpublished decision, attached hereto as Appendix 3.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on September 3, 2003. A petition for rehearing en banc was denied on January 21, 2005. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court is invoked under 28 U.S.C. §1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; that have compulsory process for obtaining witnesses in his favor, and *to have the Assistance of Counsel for his defence.*

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in case arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Petitioner, Samuel Whitt, was convicted in 1996 in a one count indictment charging him with conspiracy to distribute cocaine. Prior to trial, the Government filed a 21 U.S.C. § 851 enhancement, based upon a prior conviction. At trial, the jury did not pass on the prior enhancement, nor did they determine the amount of drugs involved in the offense. On October 7, 1997, the district court determined that the amount of cocaine involved in the offense was in excess of 150 kilograms, that a firearm enhancement was applicable, and that the Petitioner was a leader/organizer. The court was therefore duty bound under the Guidelines to impose a sentence of life without parole.

The Petitioner appealed his sentence and conviction to the Seventh Circuit, challenging the jury instructions, and challenging the fact that the judge, and not the jury, determined the type and quantity of cocaine involved in the offense. This appeal was denied on May 1, 2000 (211 F.3d 1022); however, on November 6, 2000, this Court remanded in light of the *Apprendi* decision for further review of Petitioner's claims. 531 U.S. 975 (2000) On February 7, 2001, the Seventh Circuit issued an opinion again re-affirming the life sentence. The court found that the prior conviction did not need to be determined by a jury, and that the admission of appellate counsel that at least 3.5 kilograms of cocaine were involved was sufficient to support the life sentence. 248 F.3d 1161 (7th C. 2001) A subsequent appeal back to this Court was denied on October 1, 2001. 534 U.S. 887 (2001)

Subsequently, on September 3, 2002, the Petitioner, acting pro-se, filed a motion in the district court pursuant to 28 U.S.C. § 2255, raising the following issues:

1. That the Petitioner was constructively denied the right to counsel by counsel's inability to raise an *Apprendi* type claim at trial

2. That counsel was ineffective on appeal for conceding to 3.5 kilograms of cocaine

3. That counsel was ineffective on appeal for failing to argue an *Apprendi* type claim

4. That trial counsel labored under a conflict of interest

5. That counsel was ineffective for failing to obtain a fingerprint expert

This motion was denied without a hearing on February 3, 2003. (Appendix 3) A subsequent appeal to the Seventh Circuit was denied on September 3, 2003 (Appendix 1), and a petition for rehearing en banc request was denied on January 21, 2005.

REASONS FOR GRANTING THE WRIT

The Petitioner submits that his life sentence was imposed in violation of his Sixth Amendment right to a jury determination of issues which raised his sentencing exposure. Further, the Petitioner suffered from conflicted counsel through the trial process, in violation of his Sixth Amendment right to counsel. Finally, the Petitioner's right to the effective assistance of counsel was abridged by counsel's failure to obtain a fingerprint expert.

1. The Petitioner is entitled to a new sentencing hearing based upon *United States v. Booker*

The Petitioner first submits that his life sentence must be vacated, as the sentencing judge, and not the jury, made findings which enhanced his sentence to life without parole not based upon the jury's verdict, and not based upon a beyond a reasonable doubt standard.

A. Booker

In the recent case of *United States v. Booker*, 543 U.S. --- (2005), this Court determined that the United States Sentencing Guidelines, which required judges to impose a sentence within a particular range based upon findings made using a preponderance of the evidence standard at sentencing, were unconstitutional. The Court determined that "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt" *Id.* at ---

Based upon this ruling, the various courts of appeal have ruled that where a sentence is enhanced under the Guidelines based upon conduct not supported by the jury's verdict, a remand for resentencing must occur. In the case of *United States v. Oliver*, 397 F.3d 369 (6th C. 2005), the Sixth Circuit Court of Appeals determined that where the sentencing court, and not the jury, found facts which enhanced the defendant's sentence under U.S.S.G. § 3C1.1, that this constituted a *Booker* error, and required resentencing, using only those Guidelines ranges authorized by the jury's verdict. *Id.* at 380

In the case of *United States v. Hughes*, 396 F.3d 374 (4th C. 2005), the Fourth Circuit considered a district court's calculation of a sentence in light of *Booker*. The Fourth Circuit concluded that the district court did not error in its findings on

Sentencing Guidelines enhancements, but held that, because those enhancements were based upon conduct not supported by the jury's verdict, that it was improper to base a sentence on those enhancements. Therefore, instead of a base offense level 22, as found by the court at sentencing, the defendant properly faced a level 10, which comported with the jury's verdict. The Court therefore remanded for resentencing. *Id.* at 384

In the present case, the jury's verdict supported a finding of 500 grams of cocaine being involved in the offense. Pursuant to the Sentencing Guidelines, this would support a base offense level of 26. At sentencing, however, the Government encouraged the sentencing court to use the figure of 150 kilograms of cocaine to base the sentence. The court held two days worth of hearings on sentencing, and then filed a 31 page sentencing memorandum, in which it explained why the term of 150 kilograms of cocaine could be supported by a preponderance of the evidence. The court also added two points for presence of of a firearm, and four points under 3B1.1 for leadership role. This resulted in a base offense level of 43 (capped out), which combined with the Petitioner's criminal history category, required a life sentence.

The Petitioner's sentence is the classic case of where the Sentencing Guidelines have served to become the tail which "wags the dog" of the substantive offense. See *Blakely v. Washington*, 124 S.Ct. 2531,2539 (2004) Without such enhancements (and including the Petitioner's criminal history category), the sentencing range authorized by the jury would have been 92 to 115 months. The Petitioner is serving a life term of imprisonment. As such, he is entitled to relief, as his Sixth Amendment right to a jury trial has been clearly violated.

The Petitioner would note, since *Booker*, this Court has been consistently granting certiorari and remanding for further proceedings based upon the *Booker* decision when such issue is raised in certiorari petitions. See, for example, *Malik v. United*

States, --- U.S. ---, 73 U.S.L.W. 3593 (2005); *Rice v. United States*, --- U.S. ---, 73 U.S.L.W. 3555 (2005); *Gordon v. United States*, --- U.S. ---, 125 S.Ct. 1592 (2005); *Francis v. United States*, --- U.S. ---, 125 S.Ct. 1400 (2005) The Petitioner asks for similar treatment for his case.

Finally, the Petitioner would note that, although his case is currently postured under 28 U.S.C. § 2255, his case presents a unique situation, in that he timely raised an *Apprendi/Blakely/Booker* type claim on direct review. Indeed, in light of *Apprendi*, his case was remanded for further review. In addition, during his 2255 litigation, he has contended that external forces presented his trial counsel from timely raising such a claim. Therefore, this is not a circumstance where a defendant has belatedly attempted to "jump on the bandwagon", but instead, is a situation where the issue has been constantly and consistently raised and preserved by the Petitioner. It is only at this point, however, where now the issue will not fall on deaf ears. On this basis, this Court should grant certiorari, and remand on this issue.

B. Shepard

The Petitioner further submits that this Court's decisions in *Apprendi*, *Blakely*, and *Booker* have served to undercut this Court's decision in the case of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), such that the judge's determination, at sentencing, which raised the statutory maximum sentence in this case based upon the fact of a certain prior conviction, no longer comports with the Sixth Amendment standard.

In the recent case of *Shepard v. United States*, 125 S.Ct. 1254 (2005), Justice Thomas, in his concurrence, opined that, in light of this Court's recent Sixth Amendment/jury trial jurisprudence regarding sentencing matters, that the Court's decision in *Almendarez-Torres* may no longer be good law. Justice Thomas noted that a majority of justices recognize that

the *Almendarez-Torres* decision, which allowed a judge, and not the jury, to determine enhancing factors based upon prior convictions, "was wrongly decided". *Shepard* at 1264 Justice Thomas then suggested "in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental 'imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements.'" *Id.* (Internal cite omit)

The Petitioner's situation presents such an appropriate case. The Petitioner's statutory maximum sentence was increased from 40 years to life based upon a district court's finding, at sentencing, that the Petitioner had a prior sentence which qualified for such an enhancement. Further, the Petitioner was clearly prejudiced by this judicial finding, as the Petitioner in fact received a life sentence, instead of the 40 year sentence he would have been exposed to without such a finding. On this basis, a writ of certiorari should issue.

2. Counsel rendered ineffective representation by failing to obtain a fingerprint expert

The Petitioner submits that his counsel rendered ineffective representation prior to trial by failing to investigate and obtain an expert fingerprint analysis, which resulted in prejudice, depriving the Petitioner of a reliable jury verdict.

In order to prove ineffective assistance of counsel, the defendant must prove (1) that counsel's conduct was not within the wide range of reasonable professional assistance, and (2) that counsel's deficiencies probably changed the outcome of the proceeding. *Olden v. United States*, 224 F.3d 561,565 (6th C. 2000)

As part of counsel's function in providing the effective assistance of counsel during the pre-trial phase of litigation, counsel has a duty to made adequate pre-trial investigation of defenses. *Mitchell v. Mason*, 325 F.3d 732,743 (6th C. 2003) "Reasonable performance [by counsel] includes an adequate investigation of the facts, consideration of viable theories, and development of evidence to support those theories." *Cox v. Norris*, 133 F.3d 565,573 (8th C. 1997)

While counsel's decision to not pursue a certain line of defense will not be second guessed after counsel has made investigation into that line of defense, no such "benefit of the doubt" to counsel's decision making will be given when counsel wholly fails to investigate. *Pavel v. Hollins*, 261 F.3d 210 (2nd C. 2001) Counsel has a duty to at least make an investigation into the reasonable options in a case and it can never be a reasonable choice to fail to investigate such options. *Crawford v. Head*, 311 F.3d 1288,1316 (11th C. 2002)

In the case of *Luna v. Cambra*, 306 F.3d 954 (9th C. 2002), the defendant argued that his counsel was ineffective where he failed to investigate certain witnesses. The defendant, prior to trial, had informed his counsel that he was not at the location of the crime during the offense, and that he had two

witnesses to corroborate this alibi. Despite this, counsel failed to interview these witnesses. The Ninth Circuit held that such conduct constituted deficient performance, and, had the jury heard independent corroboration of the alibi the defendant testified to, it may have resulted in an acquittal. Thus, the petition for habeas relief was granted on this basis. *Id.* at 962-963

In the present case, the only physical evidence tying the Petitioner to the offense was one fingerprint found on a plastic baggy. The Government presented the testimony of a fingerprint expert to determine that the print was that of the Petitioner. Counsel did not challenge this assertion, but merely challenged, through cross-examination, the timing of when such print could have been placed on the baggy. There was no challenge to the reliability of the fingerprint analysis, how many points were used to determine the identity, or how the print was obtained. Counsel presented no counter witness as to this crucial physical evidence.

The district court denied this claim, holding that counsel's act in cross examining the Government's expert was sufficient to overcome any lack of investigation or presentation into a separate witness. However, in the case of *Bryant v. Scott*, 28 F.3d 1411 (5th C. 1994), the court reversed a conviction on the basis of ineffective assistance of counsel under circumstances not unlike the Petitioner's case. The court held that counsel's failure to investigate witnesses amounted to ineffective representation. On appeal, the government had argued that because trial counsel effectively cross-examined the two witnesses. The court found, however, that "assuming [counsel's] cross examination to be effective, that is not to say it could not have been improved by prior investigation." *Id.* at 1419

The Petitioner submits that, had counsel done at least minimal independent investigation, it would have resulted in the defense being able to present an expert who could have refuted the only physical evidence in this case. On that basis, a

petition should issue on the claim of ineffective representation.

3. Counsel labored under a conflict of interest which violated the Petitioner's right to a fair trial

The Petitioner finally submits that certiorari should issue on his claim that his counsel's hiring, as a private investigator, of one of the main Government witnesses against him in his case created an actual conflict of interest which rendered the conviction in this case unreliable.

An attorney suffers under a conflict of interest when "he is prevented, from his own self interest or by his interest in another's welfare, from vigorously promoting the welfare of his client." *Vega v. Johnson*, 149 F.3d 354,360 (5th C. 1998) "In order to show an actual conflict, [the defendant] must make a factual showing of inconsistent interests or point to specific instances in the record to suggest that an actual impairment of his interests exists." *United States v. Ettinger*, 344 F.3d 1149,1161 (11th C. 2003)(internal cite omit) "A petitioner demonstrates an adverse effect by showing that there is a reasonable likelihood that his counsel's performance would have been different had there been no conflict of interest." *Hall v. United States*, 371 F.3d 969,974 (7th C. 2004)

In the case of *Guy v. Cockrell*, 343 F.3d 348 (5th C. 2003), the court remanded for an evidentiary hearing on the defendant's claim that his main investigator was conflicted, and thus, that conflict passed to counsel. In that case, the investigator had established a relationship with the victim's family; in fact, the investigator was eventually named in the victim's family will. The Fifth Circuit determined that there was at least a prima facie issue with regards to a conflict which could not be resolved on the record alone, and therefore, a remand for a hearing was necessary.

In Petitioner's case, his trial counsel utilized a private investigator named John McGauley for his cases on a regular basis. The problem with this is that it came to light, the week

before trial, that McGauley, who was a former FBI investigator, was to testify at the Petitioner's trial against the Petitioner as a factual witness. This raised serious conflict issues, as counsel needed to maintain McGauley's credibility for other cases, and counsel and McGauley obviously had fostered a working relationship which would have presented counsel from seriously undermining McGauley.

The district court, in denying this conflict claim, determined that the Petitioner knowingly waived this conflict prior to trial. Certainly, this issue did arise prior to trial. However, the inquiry made by the district court was not adequate to address the concern. Specifically, during the inquiry, the court asked the Petitioner "You've had adequate opportunity to discuss all of these issues with Mr. Swanson and you're satisfied as far as you're concerned that there's no conflict of interest with respect to Mr. Swanson's relationship with Agent McGauley?", to which the Petitioner replied "No." (Appendix 3, p.20)

Clearly, instead of alleviating or serving to waive the conflict, the Petitioner's response indicated that he did have an issue with Swanson's representation. Despite this, the court took no steps to ensure the Petitioner's rights, but instead went on as if the Petitioner never questioned the issue.

In the case of *United States v. Garcia*, 517 F.2d 272 (5th C. 1975), the Court indicated that there were several requirements/inquiries which a court must follow in order to ensure a proper waiver of any conflict of interest:

> [T]he district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from

> each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. [cite omit] It is, of course, vital that the waiver be established by clear, unequivocal, and unambiguous language. [cite omit] Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver, but the court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection. Recordation of the waiver colloquy between defendant and judge will also serve the government's interest by assisting in shielding any potential conviction from collateral attack, either on Sixth Amendment grounds or on a Fifth or Fourteenth Amendment "fundamental fairness" basis.

Id. at 17-18

In the present case, there is no indication any of these safeguards were used. The Petitioner only had the benefit of conflicted counsel to assist him; the court did not detail the conflict; and the Petitioner was not afforded a continuance. The inadequate inquiry by the district court cannot therefore serve as a waiver to this issue. On this basis, a writ of certiorari should issue.

CONCLUSION

The Petitioner requests that this Court reverse the findings of the Court of Appeals and the district court, and remand for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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APPENDIX

1. COURT OF APPEALS DECISION
   SEPTEMBER 3, 2003

2. COURT OF APPEALS DECISION
   JANUARY 21, 2005

3. DISTRICT COURT DECISION
   FEBRUARY 3, 2003

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted July 25, 2003
Decided September 3, 2003

Before

Hon. JOHN L. COFFEY, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

Nos. 03-1974 & 03-2367

SAMUEL L. WHITT,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeals from the United States District Court for the Northern District of Indiana, Fort Wayne Division

No. 1:02-CV-285

William C. Lee,
Judge.

ORDER

Samuel Whitt has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2255, which we construe as an application for a certificate of appealability. This court has reviewed the final order of the district court and the record of appeal. We find no substantial showing of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

2005 U.S. App. LEXIS 1362, *

SAMUEL L. **WHITT**, Plaintiff-Appellant,
v.
UNITED STATES OF AMERICA, Defendant-Appellee.

Nos. 03-1974 & 03-2367

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

2005 U.S. App. LEXIS 1362

January 21, 2005, Decided

PRIOR HISTORY :[*1] Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division. No. 1:02-CV-285. William C. Lee, Judge.

DISPOSITION: Rehearing and rehearing en banc denied.

JUDGES: Before Hon. JOHN L. COFFEY, Circuit Judge, Hon. ILANA DIAMOND ROVNER, Circuit Judge.

OPINION: O R D E R

On October 21, 2003, the plaintiff-appellant filed a petition for rehearing en banc. All of the judges on the original panel have voted to deny the petition for rehearing en banc and no judge in regular active service has requested a vote on the petition. Thus, the petition for rehearing en banc is DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

SAMUEL L. WHITT,	)	Filed
Petitioner,	)	2003 FEB-3 PH 2:30
v.	)	Stephen R. Ludwig, Clerk
UNITED STATES OF	)	U.S. District Court
AMERICA,	)	For The Northern District
Respondent.	)	Of Indiana
	)	
	)	1:95-CR-33
	)	1:02-CV-285

MEMORANDUM OF DECISION AND ORDER

This matter is before the Court on a "Petition Under 28 U.S.C. § 2255to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody" which was filed by Samuel L. Whitt on September 3, 2002. The government responded to that petition on November 2, 2002, to which petitioner filed a "Traverse in Response to Government's Response" on December 6, 2002. Because the government had neglected to address one of the issues which was raised in the initial petition, further briefing was ordered. The briefing having now been completed,[1] the petition will be denied for the following reasons.

Factual Background and Procedural Posture

This case has a lengthy procedural history and is well known to the Court. In fact, the Court wrote several lengthy opinions throughout the pendency of the criminal case prior to it being appealed. Procedurally, the record reflects the following:

On December 20, 1995, Samuel L. Whitt was charged in a one count indictment alleging that from December 1990 up

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[1]/The final brief was filed on January 21, 2003.

to and including September 1991, he conspired to distribute more than 500 grams of cocaine. The United States filed a notice of penalty enhancement, based upon a prior conviction, on March 28, 1996. A trial was then held on June 18 and 19, 1996, at the conclusion of which defendant was found guilty as charged.

The Court then held sentencing hearings on July 9 and October 7, 1997 and, after extensive briefing, the Court issued a 31 page Sentencing Memorandum and Order. In that Order, it was concluded that defendant was responsible for distributing in excess of 150 kilograms of cocaine, that he was a leader or organizer of the conspiracy, and that he utilized a firearm in his drug trafficking ventures. After a sentencing hearing was set, defendant was granted leave to file any additional motions relating to sentencing. On January 5, 1999, he filed a "Motion for Downward Departure/Request for Medical Evaluation" which was denied by Order dated March 22, 1999. On April 16, 1999, defendant was sentenced to life in prison.

He appealed. The United States Court of Appeals for the Seventh Circuit affirmed both the conviction and sentence on May 1, 2000. Defendant filed a Writ of Certiorari on June 21, 2000, a little over one month after the United States Supreme Court decided *Apprendi v. New Jersey,* 120 S.Ct. 2348 (2000). Certiorari was granted on November 6, 2000 and the decision was vacated and remanded to the Seventh Circuit for further consideration in light of *Apprendi.* After the parties filed their position statements, the Seventh Circuit, on February 7, 2001, reaffirmed both conviction and sentence. A subsequent petition for Writ of Certiorari was denied by the Supreme Court on October 1, 2001, and the present petition followed.

As indicated, petitioner was convicted of conspiring to distribute more than 500grams of cocaine for which he was convicted and sentenced to life imprisonment. The facts underlying his conviction and supporting his sentence have been thoroughly reviewed in past Orders of this Court and in decisions by the Court of Appeals. Nothing is to be gained by trying to reword those findings again.

In a Memorandum of decision and Order dated November 20, 1997 which related to petitioner's motion for a new trial, this Court wrote:

> In the present matter, there was substantial relevant evidence introduced from which a jury could reasonably find the defendant guilty beyond a reasonable doubt.
>
> Two co-conspirators, Nicole Lamb and Helen Jackson, testified about their participation in the conspiracy. Lamb testified regarding her participation with the defendant in drug distribution wherein she made deliveries, turned over money, and was paid by defendant.[2] / Helen Jackson testified that the defendant paid her to store drugs for him in her home and that the day before her house was raided by agents, the defendant had brought cocaine to her home to be stored for later distribution. She also indicated that defendant instructed her to keep a ledger of the cocaine acquired from him and the person(s) to whom she was directed to give cocaine.[3] / The ledger showed the days defendant came to Jackson's house and the amount of drugs he left on those occasions.[4]/ Although certainly not required to do so, defendant offered no affirmative evidence to rebut the government's case. Clearly such evidence supports the jury's verdict that defendant had been proven guilty of participating in a conspiracy beyond a reasonable doubt.

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[2]/She also testified about her knowledge of the defendant's participation in drug transactions with her mother, Ruby Lamb.

[3]/That ledger was introduced into evidence.

[4]/The amounts left at the house, e.g. 1/8th, 1/4th and 1/2 ounces, correspond to the amounts seized by the agents in the raid on her home. A laboratory examination revealed the fingerprint of the defendant on at least one of the seized bags of cocaine.

(Rec. 121, pp. 4-5)(footnotes in original). With regard to the amount of drugs attributable to the defendant, this Court in the lengthy Sentencing Memorandum and Order dated July 27, 1998 wrote:

> In the present matter, as indicated, the government has indicated that the defendant is responsible for approximately 111 kilograms of cocaine for the period between the Summer of 1990 and September of 1991 together with 1.6 kilograms of marijuana, 262 grams of cocaine and 44.6 grams of heroin seized from his residence. [5]/

---

[5]/ Those were the figures given to the probation office which it used to calculate the offense level. Subsequent to the most recent hearing, however, the govern has indicated that defendant is responsible for distributing at least 607 kilograms of cocaine based upon Ruby Lamb's testimony about her trips with defendant to Florida to purchase cocaine. As the government argued in its most recent brief, Ruby Lamb indicated that between 1989 and 1992, she traveled on thirty occasions with defendant to south Florida to purchase cocaine and that "on each trip the defendant would purchase between 15 and 20 kilograms of cocaine." The government then indicates that "for sentencing purposes the government would split the difference between these two numbers for an average of 17.5 kilograms of cocaine per each trip." Because Lamb testified that on one trip they purchased 100 kilograms, the total amount of cocaine is 607 kilograms (17.5 kilograms x 29 trips = 507 kilograms + 100 kilograms = 607 kilograms). The government further asserts that the amount of cocaine distributed by the defendant during 1990 and April 1991–about 108 kilograms–in a part of the 607 total kilograms purchased on the trips with Ruby Lamb.

Defendant, on the other hand, in his response to the presentence report and in a brief to this Court has indicated that, "on the generous side" he should be attributed 3.5 kilograms.[6]/ Under the government's calculation, the base offense level would be thirty-six: under defendant's calculation, the base offense level would be at the demarcation line between levels 28 and 30.

In this Court's view, conservatively, defendant is responsible for delivering in excess of 150 kilograms. That calculation is based upon the following.

Defendant sold 1/8 ounce quantities of cocaine to confidential informants on May 15, 1991, June 6, June 7, June 13, June 26, July 2, July 19, and September 3, 1991. In his letter to the probation office in response to the presentence report, the defendant has acknowledged that "the undercover buys by the informants...could form a reliable basis for determining the drug quantity in this case" and he has not subsequently argued otherwise. Those undercover buys total one ounce (8 x 1/8 oz.).

Additionally, the Court finds that the preponderance of the evidence shows that defendant was responsible for at least 21.26 kilograms of cocaine given to Ruby Lamb, Helen Jackson and Nicole Lamb for the period of the conspiracy and a brief time thereafter.

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[6]/ Defendant in his objection to the presentence report indicated that "the undercover buys by the informants, the amount of drugs estimated in the ledger, the amount of drugs seized in the raids, and the one statement by Ms. Lamb could form a reliable basis for determining the drug quantity in this case. Using that information, the drug quantity would be approximately 3.5 kilograms–on the generous side."

That calculation, which is undoubtedly quite conservative, is based on his delivering, once-a-week, a load containing 10 one-ounce, 10 1/2-ounce, 10 1/4-ounce, and 10 1/8-ounce bags to those individuals over 40 weeks. That amount is wholly supported by the following.

In statement to officers investigating this matter, Helen Jackson indicated that defendant brought the following to her home for storage:

> I kept WHITT's drugs at my house from the end of 1990 through September 1991, and recall that WHITT delivered approximately one bag of drugs per week at my house. The drugs delivered contained the following approximately [sic] amounts of cocaine; 10 to 30 ounce bags, 10 to 30 half-ounce bags, 10 to 30 quarter-ounce bags, and 10 to 30 one-eighth ounce bags.

Additionally, during the sentencing hearing, Helen Jackson testified that approximately once a week from the end of 1990 until "we got busted" (September 5, 1991), defendant would bring by "30 halves, 30 quarters, 30 eightballs" to her house. Thus, by her testimony, defendant for at least an eighth month period brought to her house weekly, anywhere from ten to thirty ounce, half-ounce, quarter ounce and eight ounce bags.

In a statement which she confirmed at the sentencing hearing, Nicole Lamb spoke to both her own, her mother's (Ruby Lamb's) and her aunt's Helen Jackson's dealings with the defendant:

SAM WHITT had been supplying my mother with bags of drugs during 1989, but I do not know the amount. WHITT averaged providing three to four bags of drugs per week to my mother from 1990 through April 1991. A typical bag contained the following amounts of cocaine: 10-one ounce containers, 10-one-half ounce containers, 10-quarter ounce containers and 10-one-eighth ounce containers. From approximately May 1991 through September 1991, WHITT provided the above approximate amounts to my Aunt, HELEN JACKSON.

* * * * * * *

In the Summer of 1990, WHITT brought over a kilo brick size of cocaine to my mother's house and broke it up in the following amounts: Ounces, half ounces, quarter ounces, and one-eighth ounces. He then placed them in plastic bags. This occurred in my presence.

* * * * * * *

In the Fall of 1992, I started working for WHITT again, selling cocaine to his customers. I did this for approximately two months and made approximately $100 per day. I conducted the drug deals the same way as before except that I kept the drugs at my house during this time. WHITT also provided the approximate same amount of drugs

> as before. After two months, I decided that I did not want to be involved with drugs and stopped selling them for WHITT.

Thus, Nicole Lamb's statement indicates that either her mother, or her aunt would receive (on a thrice weekly basis) 10-one ounce containers, 10-one-half ounce containers, 10-quarter ounce containers and 10-one-eighth ounce containers and that later she received the same amount in lieu of her aunt or mother.[7]/

Having concluded that defendant was responsible for 10 one-ounce, 10 1/2-ounce, 10 1/4-ounce, and 10 1/8-ounce bags per week during this period, that amounts to 18.75 ounces per week.

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[7]/ Both the drug ledger and Ruby Lamb's testimony generally support such amounts. Ruby Lamb testified at the sentencing hearing that when defendant would bring drugs to her or her sister's (Helen Jackson's) house, it would be in quantities of "eight balls, quarters and half ounces." She also indicated that the amouonts of drugs supplied by defendant yielded from $7,000 to $8,000 a day. A review of the ledger which accounted for deliveries from the end of June to the beginning of November indicates that "Sam" or "Jake" (which Helen Jackson indicated that defendant was also known as) came by on at least four times (6/27/91 "30 1/2, 30 qt. & 30 8b"; 7/6/91 "12 qt., 10 1/2 & 16 8b"; 7/28/91 "16 1/2, 16 qt. & 16 ob"; 8/10/91 "30, 30, 30). Although on cross-examination during the sentencing hearing Helen Jackson conceded that the drug ledger accounted for the times that defendant came by, during trial she indicated that he had come by the day before the raid with a new load but that for some reason she did not note that in the ledger. Further, while the ledger contains entry of smaller amounts generally followed by names or initials, there are other quite large amounts, with no namese next to them for which no explanation has been given (e.g. 6/3091 "19 1/2, 25 qt, 23 8ball, 3R"). The discrepancies do no5t, in this Court's view, support the conclusion that the preponderance of the evidence would show a lesser amount.

Given (at a minimum) th eight months from January until August of 1991 (when Helen Jackson or Ruby Lamb were storing the drugs) coupled with the two months in the Fall of 1992 (when Nicole Lamb indicated she resumed working for a brief stint for the defendant) and assuming four weeks per month, that totals 40 weeks. For that period, therefore, defendant is conservatively responsible for approximately 21.2 kilograms. [8]/ Additionally, defendant is responsible for the amount seized in the raid. Thus to the above sums, must be added 44.6 grams of heroin, along with 1.6 kilograms of marijuana and 262 grams of cocaine which converts to total approximately 21,5 kilograms of cocaine.

Actually, this amount of cocaine, although it is supported by a preponderance of the evidence is probably far less than that actually involved during this period. As indicated, Helen Jackson indicated in her statement that defendant would bring by 10 to 30 ounce, half-ounce, quarter ounce and eighth ounce bags. Nicole Lamb indicated that the 10 ounce, half-ounce, quarter ounce, and eighth ounce bags were brought thrice weekly. Moreover, it does not account for the tar heroin purchased in Los Angeles or the tar heroin which Nicole Lamb indicated in her statement that she sold.

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[8]/ That calculation is based on the following. Forty weeks times 18.75 ounces equals 750 ounces. There are approximately 28.35 grams in an ounce and approximately 35 ounces in a kilogram. Hence for forty weeks at 18.75 ounces per week, defendant was responsible for approximately 21.2 kilograms (18.75 x 40=750 x 28.35=21,262/1000=21.2 or 18.75/35.25=53, 53 x 40=21.2).

That figure, however, only takes into account the actual charged period of the conspiracy and a two month period when Nicole Lamb resumed working for defendant after the raid on Lafayette Street. It does not, however, account for other relevant conduct.

* * * * * * *

Ruby Lamb testified that she traveled to Florida with Sam Whitt on approximately 30 occasions from 1989 to 1991 to purchase cocaine. Generally, they would purchase 15 to 20 kilos at $18,500 per kilo. [9]/ She also testified that she went with defendant to Los Angeles on five occasions in 1990 to purchase 10 to 15 balls of black tar heroin from Mary Evans. This court believes Ruby Lamb's testimony in these regards.

The Court is not unmindful that some of Ruby Lamb's testimony was shown to be incorrect. [10]/ For example, she testified about sending back 100 kilogram via UPS. That amount (assuming 2.2 pounds per kilo) would weigh way above the limits that UPS would ship at that time. Nevertheless, the Court finds that she was attempting to be forthright and the Court has no doubts that she did in fact travel with defendant on numerous occasions in 1989, 1990 and early 1991 to purchase large sums of cocaine with the defendant and did, on a handful of occasions, travel with him to Los Angeles to purchase tar heroin.

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[9]/ The money would be shipped down ahead of time to defendant's uncle Sam Hatch.

[10]/ The Court is also fully cognizant that in 1991 Ruby Lamb suffered a nervous breakdown which she attributed to friction with the defendant. This Court does not find that fact as negatively affecting her credibility.

Even given defendant every benefit of the doubt that amount was in excess of 150 kilograms.

That defendant was dealing in cocaine in such a large amount is further borne out by other evidence which suggests that he had the financial wherewithal to purchase kilo quantities on a regular basis. For example, there is the matter of a traffic stop in Florida in which Lavon Chandler and Fred Starkes are stopped and some $340,000 is found in the trunk of the car. There is no doubt in this Court's view that that money was the defendants. There is also the matter of the time that defendant along with Ruby Lamb were stopped at the Miami airport and $119,000 was found: the reason for carrying such a large sum has yet to be credibly explained. [11]/

Although defendant argues that he should not be held accountable for any conduct other than that for which he was convicted, this Court is of the view that there is a sufficient link between the transactions to which Ruby Lamb referred and the count of conviction....

From all indications, the trips about which Ruby Lamb testified were ongoing event and occurred right up until at least the beginning of 1991. That is, there is at least somewhat of a temporal connection.

* * * * * * *

Further, there is a similarity of conduct and regularity. Helen Jackson and the two Lambs testified about receiving a significant amount of cocaine on a weekly basis from the defendant and a lessor amount of heroin.

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[11]/ Those episodes are discussed in detail in the section titled "Enhancement for Role in the Offense," *infra.*

> Ruby Lamb's testimony explains the basis for defendant's possession of such narcotics.
>
> In sum, with respect to the amount of drugs attributable to the defendant, this Court is of the view that defendant was responsible for distributing in excess of 150 kilograms of cocaine (let along whatever the amount of heroin) which, for purposes of the sentencing guidelines is all that really matters since the guidelines top off at that level. As such, his base offense level is 38.

(Rec. 133, pp.6-14)(footnotes in original, internal legal discussions omitted).

The foregoing facts set forth the basis for a discussion of the legal arguments raised by the petitioner with the exception of one issue. In his petition, the petitioner alleges that he was denied "the right to conflict free representation" and that this Court failed to make an adequate inquiry into the alleged conflict.

The record relating to the "conflict" shows that counsel for the government brought to the attention of the Court a potential conflict of interest concerning the employment of former Federal of Bureau Investigator John McGauley by defendant's trial attorney. McGauley, who was the case agent in defendant's case, had been hired as a private investigator by defendant's counsel in *United States v. Martz*, a case which was then being prosecuted by government's counsel in defendant's case and in no way involved or in any way implicated present defendant. Nevertheless, when the potential conflict was brought to the attention of the Court, the Court held a hearing and addressed defendant along with his counsel and counsel for the government and conclude that there was no conflict. [12]/

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[12]/ Excerpts from the colloquy are set forth in this Memorandum of Decision and Order in subsection IV, infra.

Application of Law

In his petition, petitioner raises five claims of error. First, he asserts that there was a *per se* violation of his right to counsel secured by the Sixth Amendment to the Constitution of the United States. His second and third claims assert a lack of effective assistance of counsel on direct appeal. Fourth, petitioner contends that he was constructively denied the assistance of counsel due to a conflict of interest which was not waived by defendant before this Court. Fifth, defendant asserts that counsel was ineffective in failing to acquire an independent fingerprint examiner. After a review of the general standards which govern post-conviction collateral relief claims, and in particular allegations of ineffective assistance of counsel, this Court will address petitioner's claims in turn under separate sub-headings.

A § 2255 motion must be granted when a defendant's "sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255. It is well-established, however, that a § 2255 motion is not a substitute for direct appeal. See *Barnickel v. United States,* 113 F.3d 704, 706 (7th Cir. 1997). Thus, before a petitioner can obtain relief under § 2255, he must satisfy the requirements for obtaining collateral relief, namely that the alleged errors are "jurisdictional, constitutional, or [are] fundamental defect[s] which inherently result[] in a complete miscarriage of justice." *Oliver v. United States,* 961 F.2d 1339, 1341 (7th Cir.1992).

Where a constitutional challenge is not raised on direct appeal, for such a challenge to be properly brought under a § 2255 proceeding, petitioner must make a showing of good cause for, and prejudice from, the failure to raise the issues on direct appeal. *Theodorou v. United States*, 887 F.2d 1336, 1339 (7th Cir. 1989). [13]/

Whenever any claim of constitutionally inadequate representation by counsel is raised by a criminal defendant (as is the case here with respect to a couple of petitioner's claims), *Strickland v. Washington*, 466 U.S. 668 (1984) provides the seminal ruling and analysis. Under *Strickland,* counsel is ineffective in a constitutional sense only when the representation was so deficient that it "fell below an objective standard of reasonableness" and was prejudicial. *Strickland*, 466 U.S. at 687-88. In assessing claims of ineffective assistance of counsel, a strong presumption exists in the attorney's favor and that counsel gave "reasonably professional assistance." *Strickland v. United States*, 466 U.S. 668, 689, 104 S.Ct. 2052 (1984). Further, under the stringent test set forth in *Strickland*, a court must examine a claim of ineffective assistance of counsel under the totality of the circumstances, and in order to prevail, a defendant's claim has to survive a two prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

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[13] The dismissal of a § 2255 petition without holding an evidentiary hearing is appropriate, if not required, when "the motion and the files and records of the case conclusively show that the prison is entitled to no relief..." 28 U.S.C. § 2255; *Olmstead v. United States*, 55 F.3d 316, 318 (7th Cir. 1995); *Dugan v. United States*, 18 F.3d 460, 464 (7th Cir.1994); *Ebbole v United States*, 8 F.3d 530, 534 (7th Cir. 1993). That is the case here.

> This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. at 687. Because one must show both deficient performance and prejudice to prevail on an ineffective assistance of counsel claim, a failure to show one or the other will defeat the claim.

I. Constructive Denial of Counsel

In his first claim, petitioner asserts a Sixth Amendment violation in that there was a *per se* violation of his right to counsel. His argument here is that he was constructively denied the assistance of counsel pretrial and during trial because of "official interference" and that said interference caused a conflict of interest. The upshot of the argument on this score is that at the time of petitioner's trial the circuit courts had consistently held that drug quantities under 21 U.S.C. § 841 were a sentencing factor to be determined by a judge by a preponderance of evidence after a jury had determined defendant's underlying guilty. Petitioner then asserts that the Supreme Court's opinion in *Apprendi* changed all that. Since his trial was held before the decision in *Apprendi*, petitioner claims that his counsel was constrained from raising the drug quantity issue based not only on prevailing case law but also under "American Bar Association Standards and the like which govern the conduct of professional lawyers" by "proscribing frivolous defenses/arguments...". (Rec. 166, p.7 fn. 6). He therefore was constructively denied counsel inasmuch as "petitioner (and like defendants) are entitled to, **and always should have been**, the assistance of counsel at the critical pretrial and trial stages of the proceedings for purposes of defending against, challenging, and 'adversarially testing' drug quantity and any evidence presented in support thereof by the Government." (Rec. 159, p. 5(d), bold in original). This Court cannot conclude that petitioner was constructively denied his Sixth Amendment right to counsel.

A presumption of prejudice is warranted when a defendant has been actually or constructively denied counsel at a critical stage of his trial. *United States v. Oliver,* 118 F.3d

562, 565 (7th Cir. 1997). Generally, this occurs if counsel is completely absent, or prevented form assisting at a critical point. [14]/ Constructive denial of counsel exists in such cases because counsel has "entirely failed[ed] to subject the prosecution's case to meaningful adversarial testing, "*Cronic*, 466 U.S. at 659, 104 S.Ct. 2039, and so prejudice is presumed. [15]/

"It is also possible to find a structural error where 'although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry in the actual conduct of the trial.'" *United States v. Chiappetta*, 289 F.3d 995, 1000 (7th Cir. 2002)(*quoting, Cronic*, at 659-60, 104 S.Ct. 2039). "Yet there are limitations to the application of this principle." *Id.* "Indeed this court [the Seventh Circuit] has opined that the structural rule may be confined to the complete denial of counsel or its equivalent." *Id.* Here, counsel's supposed inability

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[14]/ That is, cases finding an inherently prejudicial constructive absence of counsel mostly involve egregious conduct that is the functional equivalent of actual absence of counsel. *See, e.g., Hull v. Kyler,* 190 F.3d 88, 112 (3d Cir. 1999) (prejudice presumed where counsel conceded that defendant was competent to stand trial despite strong evidence to the contrary); *Tucker v. Day,* 969 F.2d 155, 159 (5th Cir. 1992) (failure of defendant's attorney to provide any assistance at resentencing hearing was constructive denial of right to counsel0; *Martin v. Rose,* 744 F. 2d 1245, 1250-51 (6th Cir. 1984) (prejudice presumed where counsel was present but refused to participate in defendant's trial).

[15]/ *See, United States v. Morrison*, 946 F.2d 484, 500 n. 3 (7th Cir. 1991) (prejudice not presumed despite counsel's failure to pursue and present an alibi defense, where he did cross-examine witnesses, impeaching them based on their prior testimony and their potential for bias); *Smith v. United States*, 182 F. 3de 1023, 1026 (8th Cir. 1999) (an ineffectiveness claim alleging "a deficiency in attorney performance" is subject to the general requirement that the defendant affirmatively prove prejudice); *Cooks v. Ward,* 165 F. 3d 1283, 1296 (10th Cir. 1998) (despite counsel's failures at trial, prejudice could not be presumed where he was present in the courtroom, conducted limited cross-examination, made objections, and gave a closing argument); *Houchin v. Zavaras*, 107 F. 3d 1465, 1471 (10th Cir. 1997)(prejudice could not be presumed despite trial errors of counsel).

to argue pre-*Apprendi* that the amount of drugs should be determined by the jury beyond a reasonable doubt hardly rises to that level.

The Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), held that a jury must decide the amount of drugs involved in section 841-typw case beyond a reasonable doubt if the sentence to be imposed is going to exceed a default statutory mandatory cap. "Before *Apprendi*, only those elements contained in § 841 (a) needed to be proven beyond a reasonable doubt; the [sentencing] factors in 841(b) could be found by a preponderance of the evidence [,]" *United States v. Martinez*, 301 F.3d 860, 864 (7th Cir. 2002) and this was generally done, as here, by the trial court at the time of, or in anticipation of, sentencing.

Notwithstanding, the general consensus pre-*Apprendi*[16]/

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[16]/ Even post-*Apprendi*, the Seventh Circuit has reiterated its long-held position that drug type and quantities are not elements of a section 841 offense:

In reading § 841, it is clear that drug type and quantity are not elements of the offense. Generally, when reading a statute, 'we can presume that its principal paragraph defines a single crime and its subsections identify sentencing factors.' *Harris*, 122 S.Ct. At 2412. Accordingly, we have repeatedly held that § 841's elements are contained in subsection (a); subsection (b) contains the considerations which determine the maximum and minimum sentence. *See United States v. Bjorkman, 270 F.3d 482, 491-92 (7th Cir.2001), cert. denied,* —U.S. —, 122 S.Ct. 2290, 152 L.Ed.2d 1049 (2002); *Brough,* 243 F.3d at 1079; see also United States v. *Duvall*, 272 F.3d 825, 830 (7th Cir.2001). Therefore, while it is clear knowledge is an element of § 841, all that its principal paragraph, §841(a), requires is that a defendant knowingly possess a controlled substance. Drug type is not specified and therefore is not an element of § 841 (a). Furthermore, all that § 841(b) requires is that the offense involve certain types and quantities, not that the defendant know the type and quantity. Accordingly, a defendant may be convicted under §841(a)(1) even if he does not know the type or quantity of the controlled substance. *See Bjorkman*, 270 F.3d at 490-91; *Brough*, 243 F.3d at 1080; *Duvall*, 272 F.3d at 830.

United States v. Martinez, 301 F.3d 860, 865 97th Cir. 2002). That said, the Seventh Circuit has also pointed out "'the possible or even likely view of the [Supreme] Court that *Apprendi* does change the traditional interpretation that drug quantity is always a sentencing factor...'". *United States v. Westmoreland*, 240 F.3d 618, 632 (7th Cir. 2001), *quoting, United States v. Angle,* 230 F.3d 113, 123 (4th Cir. 2000).

that the amount of drugs involved was to be determined by the court as a matter of sentencing, counsel certainly was not precluded from raising the argument that the amount of drugs should be submitted to the jury.[17] As the Seventh Circuit has indicated, "the foundation for *Apprendi* was laid long before 1992" and in fact, "[o]ther defendants had been making the *Apprendi*-like arguments ever since the Sentencing Guidelines came into being, and in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), the Court addressed the merits of an argument along similar lines." *United States v. Smith*, 241 F.3d 546,548 (7th Cir. 2001). Petitioner "could have invoked the themes in *McMillan,* and for that matter *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970) just as the Justices themselves did in *Apprendi.*" *Id.*

Quite obviously then, counsel was not constrained from rasing an *Apprendi*-like argument on behalf of petitioner pretrial or during trial-circuit precedent to the contrary notwithstanding. Nor would the rules of professional conduct preclude such an argument. The rules of Professional Conduct which governs the practice of Indiana lawyers specifically allows for counsel to made "a good faith argument for an extension, modification or reversal of existing law" and, indeed in even stronger language provides that a lawyer representing a defendant in a criminal proceeding "may...so defend the proceeding as to require that every element of the case be established." Rule 3.1.[18] Those

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[17]/ The Court recognizes petitioner's argument to the effect that counsel was *impeded* from making the challenge. See, Rec. 166, p. 15 & fn.8. What this Court cannot do, though petitioner does, is equate a theoretically potential impediment with the requisite "complete denial of counsel or its equivalent" threshold for a constructive denial of counsel claim.

[18]/ As the comment to that rule points out, sometimes there is the "potential for change" as "the law is not always clear and never is static."

Rules of Professional Conduct provide the standards of conduct for counsel practicing in this Court. See, N.D. Ind. L.R. 83.5(f).[19]/ Quite clearly then, the professional conduct rules were no impediment to making an *Apprendi*-type claim.

Neither precedent nor conduct rules prohibited counsel from raising the claim at trial that the amount of drugs should have been determined by the jury. That being so, petitioner's claim of the constructive denial of counsel "by official interference" must be rejected.[20]/

II. Ineffectiveness of Counsel on Direct Appeal

Petitioner claims that counsel was ineffective on direct appeal. This was so, petitioner asserts, because counsel conceded that petitioner was responsible for distributing 3.5 kilograms of cocaine.

As indicated in the prefatory statement of governing law,

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[19]/ The Federal Rules of Criminal Procedure specifically provide for a district court to "make and amend rules governing its practice."F.R.Crim.P. 57(a)(1).

[20]/ Insofar as "[p]etitioner has defined and characterized the nature of the 'official interference' as Congress' intent to unconstitutionally remove the assessment of facts (drug quantity pursuant to § 841) from the jury" that characterization too must be rejected: *Apprendi* and *Nance* do not establish that anything in §841 is unconstitutional or require its severance. If Congress had specified that only judges may make the findings required by § 841(b), or that these findings must be made by preponderance of the evidence, then § 841would create a constitutional problem. But the statute does not say who makes the findings or which party bears what burden of persuasion. Instead the law attaches effects to facts, leaving it to the judiciary to sort out who determines the facts, under what burden. It makes no constitutional difference whether a single subsection covers both elements and penalties, whether these are divided across multiple subsections (as § 841 does), or even whether they are scattered across multiple statutes (see 18 U.S.C. §§924(a), 1963). *Apprendi* holds that the due process clauses of the fifth and fourteenth amendments make the jury the right decision maker (unless the defendant elects a bench trial), and the reasonable-doubt standard the proper burden, when a fact raises the maximum lawful punishment. How statutes are drafted, or implemented, to fulfil that requirement is subject to which the Constitution does not speak. *United States v. Brough,* 243 F.3d 1078, 1079 (7th Cir. 2001).

a claim of ineffective assistance of counsel requires a showing that counsels performance fell below an objective standard of reasonableness and that but for counsel's errors the result of the proceeding would have been different-a tough row to hoe given the deference afforded the strategic choices of counsel. To be sure, ineffective assistance can be claimed against appellate counsel and "[g]enerally speaking, the performance of appellant counsel is assessed using the same standards applied to trial counsel under *Strickland*....," including the "strong presumption that petitioner's counsel was constitutionally effective." *Mason v. Hanks*, 97 F.3d 887, 892 (7th Cir. 1996).

Importantly, "*Strickland* builds in an element of deference to counsel's choices in conducting litigation...". *Holman v. Gilmore*, 126 F.3d 876,881 (7th Cir. 1997). Likewise, the "process of 'winnowing out weaker arguments on appeal and focusing on 'those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 106 S.Ct. 2661, 2667 (1986) quoting, *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3312-13 (1983). Hence, "strategic choices made after thorough investigation of the law and facts relevant to the plausible options are virtually unchallengeable....". *Strickland*, at 690-91, 104 S.Ct. at 2066.

This Court can hardly fault counsel, let alone find him ineffective, [21]/ for conceding to 3.5 kilograms. Evidence to support that amount was overwhelming–almost to the extent of being a given. It is to be recalled that this Court found petitioner responsible for more than 150 kilograms of cocaine. Leaving aside testimony which showed the Ruby Lamb was supplied with 108 kilograms of cocaine, testimony from Nicole Lamb established that petitioner dealt at least in one kilogram of cocaine and the drug ledger demonstrated that petitioner was responsible for another three kilograms. Faced with such findings it is quite clear

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[21]/ In his filings, petitioner asserts that his claim should be addressed under the *Strickland* standard as well as the prejudice *per se* standard of *Cronic*. This Court finds no basis to make ans analysis under *Cronic* since, like in the last section, there is no support for the proposition that counsel was absent, his actions failed to subject the prosecution's case to the adversarial process, or the functional equivalent of either.

that the appellate counsel was attempting to limit the drugs attributed to defendant and thereby attempt to limit his exposure to prison time. It was a strategic attempt and, though it failed, counsel cannot be deemed ineffective.

In his briefs, petitioner asserts that counsel was nevertheless incompetent by admitting to the 3.5 kilograms without petitioner's approval because doing so was a mistake. The theory is that by admitting to that amount, counsel was admitting that petitioner was required to be sentenced at a higher statutory range than the up-to-twenty years provision of 21 U.S.C. § 841 (b)(1)(A).[22]/

This court can hardly classify counsel's action as mistake. A trial court has discretion to sentence anywhere within the guideline range. See, *United States v. Byrd*, 263 F.3d 705, 707 (7th Cir. 2001). Here, as indicated, the amount of 3.5 kilograms was well-established and it was therefore prudent for counsel to admit to that amount. The strategy was obvious-with a far lower amount (3.5 kilograms as opposed to 150 kilograms) the possibility of receiving a lower sentence within the guideline range would be much greater. Hence, counsel certainly was not incompetent in making the concession that he did.

III. Ineffectiveness of Counsel in Failing to Make Official Interference Argument

Petitioner's third claims is really an off-shoot of his first claim in that he asserts counsel was incompetent on direct appeal

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[22]/ Petitioner also suggests that his counsel was mistaken by pointing to the following passage from the Seventh Circuit's February 7, 2001 Order:

Whitt's appellate lawyer seems to be under the impression that *Apprendi* requires not just 500 grams, but the whole 150 kilograms, to be proved to the jury beyond a reasonable doubt. That is not so. All *Apprendi* governs is the amount that affects statutory maximum sentences.

That passage and the language following it does not show that counsel was mistaken in regard to the threshold amount required to increase the statutory range. All it shows is that counsel was arguing that since the finding by the Court was that petitioner distributed 150 kilograms of cocaine, the jury would have to determine the same amount-a proposition for at least 500 grams to bump up the statutory range, something which incidentally the Court of Appeals said the jury was "bound to find."

because counsel failed to argue that constructive denial of the assistance of counsel. This Court must reject that argument under the same analysis as set forth with regard to claim one.

This Court would also point out that on direct appeal counsel argued that the Indictment was constitutionally defective because it did not specifically allege the type and quantity of controlled substance. The Seventh Circuit addressed that argument writing that "because such argument has specifically been rejected on numerous occasions by this court...we decline to consider this issue any further." *United States v. Whitt*, 211 F.3d 1022, 1026 (7th Cir. 2000)(internal citations omitted). Nevertheless, by raising the argument, counsel was able to preserve the issue for appeal, resulting in the granting of certiorari by the Supreme Court, the judgement being vacated, and the case being remanded to the Seventh Circuit for further consideration. *United States v. Whitt*, 121 F.3d 423 (2000). Counsel on appeal can hardly be said to have been ineffective within the meaning of *Strickland*.

IV. Alleged Conflict of Interest

In his fourth claim, petitioner asserts that there was a conflict of interest on the part of his trial counsel which petitioner did not waive. As indicated in the recitation of facts, the alleged conflict of interest related to defense counsel's employment of an ex-FBI agent (who had been the primary investigator in defendant's case) as a private investigator in a wholly unrelated case. Upon being informed of this matter by government's counsel,

the Court held a hearing during which the following took place:

MR. MILLER [counsel for the government]: Your honor, there was a matter the Government wanted to take up, we mentioned it the other day in the telephone conference, and I just wanted to make sure a record here in open court in regard to what the Government raised as a potential conflict of interest and have the Court address Mr. Whitt as to his pleasure in that regard.

THE COURT: You're referring to the matter of Mr. Swanson [defendant's counsel] having employed in some other case the

former FBI agent who in fact was the agent in charge in this case and who at least indicated at that time you intend to call as a witness?
MR. MILLER: Yes, sir.
THE COURT: Very well.
MR. MILLER: If I, just for the record, your honor, the government's concern is there may be a conflict of interest or an appearance of conflict of interest in this regard. A, number one, that former Agent McGauley is now a witness for the government and we are concerned that should the Government prevail in some post-trial proceeding, an allegation would be made that somehow confidences may have been shared.
The second is that because Agent McGauley–former Special Agent McGauley is currently employed by Mr. Swanson, that on cross examination Mr. Swanson may not cross examine as vigorously as he would have had that relationship not existed.
THE COURT: Well, I think the point is well taken that you should have on the record Mr. Whitt's acknowledgment of this information as an indication of whether or not he finds anything wrong with that.

Mr. Whitt, do you understand the point Mr. Miller has raised?
THE DEFENDANT: Yeah.
THE COURT: Do you understand Special Agent McGauley who is now retired from the FBI, was the agent in charge of this case when it was investigated?
THE DEFENDANT: Yes.
THE COURT: Since he is retired from the FBI, as I understand it, he has started his own investigative agency and at least one case in this court and perhaps others, Mr. Swanson can tell us that, Mr. Swanson has engaged Mr. McGauley as a private investigator to assist him in the preparation of those cases.
Do I accurately state the matter, Mr. Swanson?
MR. SWANSON: Yes, your honor, and going a little further if you like.
THE COURT: All right. Why don't do you [sic] that.
MR. SWANSON: To further delineate the relationship. I have indeed in United States versus Martz employed Agent McGauley. He and I have discussed this particular case. I did not know that

PUBLISHER'S NOTE:

Page 24 is missing in original document.

Special Agent because in the past when we do these 2255's, these are issue that come up.
THE COURT: Yes, and I take it that is clearly the case, Mr. Swanson?
MR. SWANSON: This is clearly the case. He knows more about it than I do.[23]/

(Transcript, 7/18/1996, pp. 3-8). Quite clearly the Court thoroughly addressed the potential conflict of interest.

In his petition, petitioner disputes that he had discussed the matter with his counsel the Friday before the colloquy in Court as suggested in the above excerpt and also assert that when "the Court inquired of the petitioner whether he was satisfied with Mr. Swanson's representations notwithstanding: Petitioner adamantly stated 'no' he was not ." (Receive. 169, p. 6a). The Court rejects the former unadorned assertion and, as for the latter, finds it to be belied when the colloquy is read as a whole.

As for the petitioner's claim that he did not discuss the matter with counsel the Friday before, if that were so he was free to make assertion in open Court when the matter was being

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[23]/Petitioner reads this last line as suggesting that Mr. Swanson, his counsel, was indicating that former-FBI agent McGauley knew more about the underlying prosecution than did defense counsel. That clearly is a mischaracterization. The statement "[h]e knows more about it than I do" is either in response to government's counsel assertion that conflict of interest issues often arise in the context of collateral 2255 proceedings ro is a statement that government counsel knew from former-Agent McGauley that no confidences had been shared by defense counsel.

discussed in his presence. That he did not do so suggests that he did in fact talk with his counsel about the matter prior to going to Court that day. Besides, even if he did not talk with counsel about the potential conflict prior ro the colloquy, the record make clear that a pause in the proceedings was held so that petitioner could talk about the matter at that point in time.

As for petitioner's assertion that he adamantly stated he was not satisfied with Mr. Swanson's representation, that is a mischaracterization of the question posed to him for he was being asked only whether he thought in light of the conflict Mr. Swanson could adequately carry out his function as defense counsel. True, petitioner's negative response to the questions "[y]ou've had adequate opportunity discuss all of theses issues with Mr. Swanson and you're satisfied as far as you're concerned that there's no conflict of interest with respect to Mr. Swanson's relationship with Agent McGauley?" could be read as suggesting that petitioner was not satisfied that there was no conflict. It could also be read quite differently in that the response "no" was in regard to the portion of this Court's questions "there's no conflict of interest with respect to Mr. Swanson's relationship with Agent McGauley" with the "no" meaning no conflict.

This latter reading is undoubtedly the correct one when the colloquy is read as a whole. The question which elicited the negative response came right after petitioner spoke with counsel about the potential conflict and then informed the court "yeah, we can go forward." Moreover, the colloquy went on and defendant never one voiced any suggestion that he had any problem with defense counsel representing him even in spite of the potential conflict.

That aside, petitioner has again failed to show prejudice. Even without Agent McGauley's testimony there was a plethora of evidence to convict the defendant including the testimony of

Nicole Lamb, Helen Jackson and the drug Ledger. [24]/

V. Ineffectiveness of Counsel in Failing to Employ Fingerprint Examiner

Petitioner's final contention is that trial counsel was ineffective in failing to retain an independent fingerprint examiner. This argument related to government's exhibit 7 which was a baggie which had been found in Helen Jackson's home after it had been raided by drug agents. Government's exhibit 7 was admitted at trial and the government's fingerprint expert testified that defendant's fingerprints had been found on the bag.

Prior to trial, counsel sought leave under the Criminal Justice Act to retain a fingerprint expert. The request was granted. However, an examiner was apparently no employed and no independent evidence was presented by the defense about the fingerprint on the baggie.

Petitioner contends that this was ineffectiveness on his counsel's behalf, particularly when on considers that the jury sent out one note during trial and that note related to the fingerprint evidence. In the Court's view, however, petitioner places way too much stock in the note from the jury.[25]/

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[24]/Petitioner also claims that the Court erred in failing to conduct an inquiry into an alleged conflict of interest which arose as a result of defendant's counsel having previously represented co-defendant Ruby Lamb in a previous state court drug case. To say that this was underdeveloped at trial and now is an overstatement. Although a court should hold a hearing when it becomes aware a conflict of interest, the Court must be aware of the conflict for a court cannot "be charged with a duty to keep track of the conflicts of every practitioner appearing before it." *Berry v. United States*, 293 F.3d 501, 504 (8th Cir. 2002).

[25]/The note from the jury read: "We have a questions [sic] about the type of fingerprints (discernable, undiscernable [sic] or unidentifiable) other than Samuel Whitts. Please clarify the issue of fingerprints found as in regards to the evidence (Government exhibit 7)."

As indicated, for a claim of ineffectiveness to be successful, petitioner must show that counsel's performance was deficient to the extent that he was not functioning as counsel guaranteed by the Sixth Amendment and he must show that that deficient performance prejudiced the defense because it was so serious as to deprive defendant of a fair trial. Implicit in the *Strickland* standard is that a good deal of deference must be given to counsel's choices in conducting litigation.

A review of the record relative to the fingerprint evidence makes clear that counsel most likely undertook the strategy of not engaging a fingerprint expert in favor of cross-examining the expert put on by the government. That much is borne out by his cross-examination of the government's expert with the thrust of the questions being that sandwich baggies were common items in households throughout the country; that the examiner could not tell when the prints were made on the baggie and hence could not tell if it contained cocaine at the time petitioner touch it; and that although there exemplars were given by Helen Jackson, the fingerprint examiner could not positively identify her prints on the baggie.

The government surmises, and probably quite properly so, that counsel strategically chose not to have a second comparison made between the petitioners fingerprints and those found on the baggie so as to not rick having a second expert confirm that the prints were the petitioner's. Yet even if that were not the case, the Court cannot say that counsel was ineffective. As indicated before, the government presented testimonial evidence that petitioner was supplying cocaine to Nicole Lamb, Ruby Lamb, and Helen Jackson. After a two day trial, it took the jury less than three and one-half hours to return a verdict of guilty. Given the evidence, even had a finger print examiner been hired by defense counsel, and even if he had testified that petitioner's fingerprints were not on the baggie, the outcome would undoubtedly have been the same.

Conclusion

On the basis of the foregoing, the "Petition Under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody" which was filed by Samuel L. Whitt on September 3, 2002 is DENIED.

SO ORDERED this 3rd day of ~~January~~ February 2003.

s/William C. Lee
William C. Lee, ~~Chief~~ Judge
United States District Court